Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

PRIVATE KELSEY A. MILLER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the court of appeals erred in holding that Petitioner was not a "suspect" within the meaning of Article 31(b), Uniform Code of Military Justice, and therefore not entitled to warnings concerning his right to remain silent and his right against self-incrimination.

II

Whether the court of appeals erred in holding that Petitioner was not in custody when he was questioned by the military police, and therefore not entitled to *Miranda* warnings.

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Private Kelsey A. Miller, U.S. Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces is reported at 48 M.J. 49 (1998). The opinion is located at Appendix A (App. 1a-23a). The opinion of the Navy-Marine Corps Court of Criminal Appeals, No. 9600805 (N.M.Ct.Crim.App. September 15, 1995), is located at Appendix B (App. 24a-54a).

JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on March 17, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

STATUTE INVOLVED

10 U.S.C. § 831(b), Article 31(b), Uniform Code of Military Justice, [hereinafter UCMJ], provides in pertinent part:

> No person subject to this chapter may interrogate . . . any person suspected of an offense without first . . . advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used in evidence against him in a trial by court martial.

STATEMENT

On the night of January 11, 1990, Petitioner and his four companions were socializing in Jacksonville, N.C., just outside Camp Geiger. (Record [hereinafter R.] at 525-28, 542, 647.) Petitioner presented evidence that between the hours of 1:00 a.m. and approximately 3:00 a.m., the five men were at a club known as Rich's, a gas station, a Burger King restaurant and the Beacham Apartment complex.[1] (R. at 518, 525-28, 578-79, 580, 665, 681, 705, 706, 801, 827; Defense Exhibit J; Prosecution Exhibit 17.) According to Camp logs, the group returned to base at 2:54 a.m. on January 12, 1995.

That same night, sometime between 1:30 a.m. and 1:45 a.m., two Marines on board Camp Geiger were attacked and robbed. (R. at 278-80, 302-304.) An eyewitness described the assailants as five black, male Marines. (R. at 323, 330, 428-29.) The Camp Lejeune military policeman [hereinafter MP] on duty, Lance Corporal [hereinafter LCpl] Sepulvado, was notified of the assault and instructed to be on the lookout for these five black Marines suspected of committing the offense. (R. at 323, 330, 428-29.)

At the same time, the New River Air Station MPs also responded to the call. (R. at 408.) At approximately 3:00 a.m., Sergeant [hereinafter Sgt] Davis, a New River MP, saw Petitioner and four other black males together on

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[1] The evidence Petitioner presented consisted of two store receipts and the testimony of nine witnesses. (R. at 518, 525-28, 578-79, 580, 665, 681, 705, 706, 801, 827; Defense Exhibit J; Prosecution Exhibit 17.)

base. (R. at 408, 429.) As he approached, one of the five men said, "[h]ere come the MPs, let's go." and two of the men fled into the barracks. (R. at 417, 483, 487-88.) Sgt Davis stopped the three remaining Marines and had them retrieve the two who fled. (R. at 417.) The MP requested their names and identifications and then released them. Id.

As the five men were walking away, LCpl Sepulvado arrived on the scene. Seeing the five black Marines, LCpl Sepulvado asked the Air Station MPs "if they were the ones" and he was told "yes." (R. at 429.) LCpl Sepulvado indicated that he needed to speak with these Marines, and he sent the duty non-commissioned officer [hereinafter NCO] to bring all five to him to be interviewed. (R. at 429, 444.)

LCpl Sepulvado questioned each Marine individually while the others remained in the custody of the other MPs. (R. at 430, 431.) He asked general questions such as name, social security number, height, weight and military organizational unit and then entered the information onto "stat sheets", in the "victim/suspect" block. (Prosecution Exhibit 12.) However, LCpl Sepulvado then began asking more specific and accusatory questions, including:

- "Where have you been?",
- "What have you been doing tonight?",
- "What have you been doing for the past 45 minutes?",
- "Where did you go when you were out?",
- "What time did you leave the barracks?",
- "How long have you been here on base?",
- "Where is the club located?",
- "How did you get to the apartments?",
- "How far apart are those places?",
- "What were you doing at the Beacham Apartments?",

- "Did you know someone there?",
- "Were you visiting someone?",
- "Was there a party?" and
- "Why were you there?".

R. at 438, 449, 455-57, 862.

Petitioner explained to the MP that he had been out in town that night, however, LCpl Sepulvado found his answers to be vague and hesitant. (R. at 451, 454, 459.) The government offered the testimony of LCpl Sepulvado as an admission that Petitioner did not specifically answer each of the questions to the MP's satisfaction. The defense initially objected to the admission of this testimony on the bases that this questioning was not preceded by rights warnings (pursuant to Article 31(b), UCMJ) and that the use of the statements was not disclosed to the defense prior to trial.

The military judge would not allow the testimony in the prosecution's case in chief; however, he did allow the prosecution to use it in rebuttal.[2] The government used this evidence to rebut Petitioner's alibi that he had been to a club, a gas station, a restaurant and the Beacham Apartments because the answers were "vague", "hesitant", and "not cooperative." (R. at 451, 454, 459.) He did not

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[2] The court of appeals observed that, "[w]hen LCpl Sepulvado was tendered as a rebuttal witness, defense counsel appears to have withdrawn his Article 31(b) objection, telling the military judge, "Sir, after reviewing the law, I will not object to admission of the statements for those purposes." United States v. Miller, 48 M.J. 49, 53 (1998). However, defense counsel then went on to briefly argue that LCpl Sepulvado's questioning was a second investigation in which Petitioner and his companions "didn't have a choice in the matter . . . it wasn't up to them whether or not they could leave." Id. Moreover, the court of appeals did not resolve this issue on the basis of waiver, but issued a holding addressing the substantive issues.

make findings of fact and said nothing other than that Article 31(b) rights were not required. (R. at 463, 867.)

On September 15, 1995, the Navy Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Miller*, No. 9600805 (N.M.Ct.Crim.App. September 15, 1995). The United States Court of Appeals for the Armed Forces affirmed the decision of the United States Navy Marine Corps Court of Criminal Appeals on March 17, 1998. *United States v. Miller*, 48 M.J. 49 (1998).

REASONS FOR GRANTING THE PETITION

I

The Court of Appeals for the Armed Forces erred in holding that Petitioner was not a "suspect" within the meaning of Article 31(b), UCMJ, and therefore not entitled to warnings concerning his right to remain silent and his right against self-incrimination.

The military police illegally interrogated Petitioner in violation of his right to remain silent and his right against self-incrimination by failing to administer warnings as prescribed by 10 U.S.C. §831, Article 31(b), UCMJ. In so doing, the government has undermined the protections uniquely afforded servicemembers and so necessary in the inherently coercive atmosphere of the military. LCpl Sepulvado suspected Petitioner of assault, yet persisted in interrogating him without administering Article 31(b) rights. The military judge erred in allowing the government to rebut Petitioner's alibi defense with these illegally obtained statements. The court of appeals erred in upholding this ruling by finding that Petitioner was not a suspect within the meaning of Article 31(b), UCMJ.

10 U.S.C. §831, Article 31, UCMJ, provides:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used in evidence against him in a trial by court-martial.

Military Rule of Evidence 305(c) prohibits the interrogation of a person suspected of an offense without informing him of his rights. In other words, a "servicemember is entitled to this rights advice [under Article 31(b)] only if he is a suspect at the time of the questioning and the questioning itself is a part of an official law enforcement investigation or disciplinary inquiry." *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991).

In the instant case, there is no doubt that LCpl Sepulvado was engaged in an "official law enforcement investigation" at the time he questioned Petitioner. LCpl Sepulvado was the duty MP, and was actively investigating the assault when he questioned Petitioner. Accordingly, this satisfies the "official law enforcement investigation" requirement of Article 31(b).

The Court of Appeals for the Armed Forces, however, erroneously held that Petitioner was not a "suspect" within the meaning of Article 31(b). *See United States v. Miller*, 48 M.J. 49, 54 (1998). The lower court based its decision upon the conclusions that: (1) the investigation had not sufficiently narrowed to make Petitioner a suspect; and (2) "[i]t was no more than an

attempt to find witnesses to the crime and a preliminary effort to screen out those who could not have been involved."[3] Id.

An individual is a "suspect" when, "the military questioner believed or reasonably should have believed that the servicemember committed an offense." *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991); *United States v. Hilton*, 32 M.J.393, 396 (C.M.A. 1991); *United States v. Anglin*, 18 U.S.C.M.A. 520, 523-524, 40 C.M.R. 232, 235-236 (1969). In the case at bar, the MP on duty, LCpl Sepulvado, had been informed of the assault and was instructed to be on the lookout for five black Marines, suspected of committing it. When he found the Air Station MPs detaining five men who fit the description, he asked "if these were the ones" and was told "yes". LCpl Sepulvado identified and detained the five suspects, then questioned them at length, asking a battery of inherently incriminating questions.[4] *See, supra*, p. 5.

The nature and quantity of the questions which LCpl

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[3] The Court of Appeals for the Armed Forces noted that the facts in the case *sub judice* "would not even justify a *Terry* stop." *United States v. Miller*, 48 M.J. 49, 54 (1998) (citing *United States v. Miller*, No. 9600805 (N.M.Ct.Crim.App. September 15, 1995)); *see also Terry v. Ohio*, 392 U.S. 1 (1968). This Court has never addressed the hierarchy of the degree of suspicion which triggers Article 31(b) rights, versus that required to justify a *Terry* stop. Petitioner contends that the lower court was in error because Article 31(b) warnings are triggered by a lower level of suspicion than a *Terry* stop. The factual scenario in the case *sub judice* presents an optimal opportunity for this Court to address this issue.

[4] Interrogation is defined broadly as "any formal or informal questioning in which an incriminatory response either is sought or is a reasonable expectation of such questions." Military Rule of Evidence 305(b)(2).

Sepulvado asked eliminate any doubt as to his perception that Petitioner was a suspect. His repeated asking of these questions clearly portray a law enforcement interrogation of a person suspected of a criminal offense. LCpl Sepulvado's questioning far exceeded "an attempt to find witnesses to the crime and a preliminary effort to screen out those who could not have been involved" and squarely entered the realm of questions designed to elicit incriminating information. In fact, LCpl Sepulvado admitted that these were the very type of questions he asked when interviewing a suspect as part of his "investigative technique." (R. at 450, 452, 457.)

The purpose of Article 31 warnings is to counteract the presence of "'presumptive coercion' implicit in military discipline and superiority which might operate to deprive an accused of his free election to speak or to remain silent." *United States v. Duga*, 10 M.J. 206, 209 (C.M.A. 1981) (*citing United States v. Gibson,* 3 U.S.C.M.A. 746, 754, 14 C.M.R. 164, 172 (1954) (Brosman, J., concurring)). The "subtle pressures" which exist in military society create a "special obligation" upon servicemembers to answer questions when asked. *Duga*, 10 M.J. at 210 (*citing United States v. Armstrong*, 9 M.J. 374, 378 (C.M.A. 1980)).

The prejudice to Petitioner by the use of his responses is direct and manifest. The defense profferred extensive evidence that Petitioner did not and could not have committed these offenses because he was not on base at the time it was committed. Nonetheless, the government used his statements to rebut that very defense. The prosecutor argued that Petitioner's non-specific answers to the questions of LCpl Sepulvado proved that he had not been to the club, the gas station and the Burger King and that there was no alibi. (R. at 929.) This error was not harmless because this "evidence" was argued as a vital

element of the government's case. Furthermore, it has long been a basic precept of military law that the use of a statement taken in violation of Article 31(b) is inherently prejudicial "without regard to the state of the record otherwise." *United States v. Loukas,* 29 M.J. 385, 395 (C.M.A. 1990) (Everett, C.J., dissenting) (*citing United States v. Reynolds*, 16 U.S.C.M.A. 403, 406, 37 C.M.R. 23, 26 (1966)); *see also* Article 31(d), UCMJ; *Hilton,* 32 M.J. at 392; *United States v. Dohle*, 1 M.J. 223, 226 (C.M.A. 1975); *United States v. Jordan*, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971); *United States v. Wagner*, 18 U.S.C.M.A. 216, 39 C.M.R. 216 (1969).

II

The Court of Appeals for the Armed Forces erred in holding that Petitioner was not in custody when he was questioned by the Military police, and therefore not entitled to *Miranda* warnings.

Custodial interrogation requires warnings in accordance with the Fifth Amendment and Article 31(b). *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *United States v. Schake*, 30 M.J. 314, 318 (C.M.A. 1990). "Custodial interrogation" exists when a suspect reasonably believed that his freedom of action was curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). This standard was adopted in military jurisprudence in *United States v. Schake*, 30 M.J. 314, 318 (C.M.A. 1990).

In the case at bar, Sgt Davis, a New River MP briefly stopped, questioned and then released Petitioner and his friends. As the five men were walking away, LCpl

Sepulvado arrived, saw them and informed Sgt Davis that he needed to speak with them. The Lance Corporal then had his Duty NCO detain the five men as he questioned each at length, individually, about their whereabouts that night.

Clearly, Petitioner and his five friends were not free to leave. They had been detained by the duty MP and had each been questioned at length. In fact, the five men actually had attempted to leave when Sgt Davis had finished with them, yet LCpl Sepulvado instructed that they be further detained.

This situation plainly amounts to custody. Petitioner reasonably believed that his freedom of action was curtailed to a degree associated with formal arrest. Such a scenario entitled Petitioner to *Miranda* warnings. The failure to administer such warnings renders the admission of Petitioner's responses constitutionally infirm.

CONCLUSION

The lower court's decision dangerously erodes the indispensable warning protections so necessary to safeguard service members from the uniquely coercive environment of the military. This ruling imperils the hundreds of thousands of men and women who wear the uniforms of our nation. Article 31(b) was designed to forestall exactly this type of situation. Indeed, if rights warnings are not required when an MP detains and interrogates a service member in the dead of night, then the death knell for Article 31(b) is surely sounding on the horizon. This Court should grant review of this case to correct the dangerous precedent set by the court of appeals.

Respectfully submitted,

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June 1998

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 96-0805

Crim.App. No. 91 0783

United States, *Appellee*

v.

Kelsey A. Miller, Private,
U.S. Marine Corps, *Appellant*

Argued Oct. 7, 1997

Decided Mar. 17, 1998

For Appellant: *William J. Holmes*, (argued); *Lieutenant C.J. McEntee*, JAGC, USN (on brief); *Lieutenant John Holden*, JAGC, USNR.

For Appellee: *Lieutenant Randy S. Kravis*, JAGC, USNR (argued); *Colonel Charles Wm. Dorman*, USMC (on brief); *Commander D. H. Myers*, JAGC, USN.

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officers

convicted appellant, contrary to his pleas, of conspiracy, robbery, and assault with intent to commit robbery, in violation of Articles 81, 120, and 134, Uniform Code of Military Justice, 10 USC §§ 881, 920, and 934, respectively. The adjudged and approved sentence provides for a dishonorable discharge, confinement for 10 years, total forfeitures, and a fine. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

Our Court granted review of the following issues:

I

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING ADMISSIONS MADE BY APPELLANT DURING A CUSTODIAL INTERROGATION BY A MILITARY POLICEMAN IN THE EXECUTION OF HIS LAW ENFORCEMENT DUTIES WHERE APPELLANT WAS NEVER ADVISED OF HIS ARTICLE 31 OR FIFTH AMENDMENT RIGHTS.

II

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY REFUSING TO ALLOW APPELLANT TO IMPEACH THE SOLE PROSECUTION WITNESS WITH A CONVICTION AND OTHER ACTS OF DISHONESTY WHICH ARE PERMITTED UNDER THE RULES OF EVIDENCE AND REQUIRED BY THE SIXTH AMENDMENT.

III

WHETHER THE MILITARY JUDGE COMMITTED

PREJUDICIAL ERROR BY REFUSING TO APPLY THE CORRECT LEGAL STANDARD AND PREVENTED APPELLANT FROM TESTIFYING ON HIS OWN BEHALF.

IV

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY PERMITTING NIS AGENT BILLER TO BE DESIGNATED AS A GOVERNMENT REPRESENTATIVE AND TO LISTEN TO ALL OF THE TESTIMONY AND CROSS-EXAMINATION BEFORE TESTIFYING AND INTERPRETING AND GIVING HIS IMPRESSIONS OF THAT EVIDENCE.

For the reasons set out below, we affirm the decision of the Court of Criminal Appeals.

Factual Background

At about 1:30 a.m. on the morning of January 12, 1990, two Marines were attacked and robbed outside a barracks at Camp Geiger, near Camp Lejeune, North Carolina. The attackers were identified as five black males. Lance Corporal (LCpl) Copeland was standing in the rear doorway of the barracks and saw the attack. He testified that he saw five individuals crouched down near a roadway and watched as they ran toward the rear of building 544, a unit barracks. LCpl Copeland walked to the rear door of building 544 and saw two individuals beating one of the victims. LCPL Copeland notified the duty noncommissioned officer (NCO) that "something" was happening and then picked up a metal rod and began running toward the assailants. As two of the assailants jumped up and ran past Copeland at a distance of 6-7 feet, he recognized them. At trial he

identified appellant as one of the assailants.

Initially, LCpl Copeland was a reluctant witness. At trial he admitted that, on the night of the incident, he accompanied the two victims to the naval hospital and was interviewed by the military police, but that he intentionally gave them the impression that he did not know the identity of the assailants. He explained that he "didn't really want to get involved with what was going on."

On cross-examination, Copeland testified that he was in the same company as appellant and the four other assailants. He admitted that, in his first two sworn statements to the investigators, he did not identify appellant by name. He also admitted that, after he returned to the barracks, he learned that appellant and Private First Class (PFC) Smith had been apprehended, but when Special Agent (SA) Biller asked him if appellant and PFC Smith were the two assailants, he told Biller that they were not. On January 17, 1990, 5 days after the incident, Copeland finally told SA Biller that appellant and PFC Smith were the assailants.

LCpl Copeland also admitted at trial that he told SA Biller under oath and testified at the Article 32[1] investigation that he did not know PFC Smith by name, but that those statements were false. Copeland eventually admitted knowing Smith by name after he was extensively cross-examined at the Article 32 hearing.

Finally, LCpl Copeland admitted that, at the hospital, one of the victims, LCpl Bender, asked him if he knew who the assailants were. Copeland testified that he told Bender that he knew who they were, but he did not tell Bender their names because Bender "just said he wanted to go around and

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[1] Uniform Code of Military Justice, 10 USC § 832.

beat somebody up," and appellant "just didn't want to tell him at that time."

Neither of the two victims were able to identify their assailants. One told the Naval Investigative Service (NIS) agents that his assailants were black. Although he was unsure, he thought his assailants were wearing g "cammies," the Marine Corps camouflage utility uniform. The other victim knew only that his assailants were black, but he did not know what they were wearing. The company duty NCO reported to the military police that the assailants were wearing civilian clothes.

Appellant presented an alibi defense. He asserted that he spent the evening with four friends at an off-base club called Rich's. When the club was closed early by the fire marshall because it was overcrowded, he and his friends went to the Scotchman, a combination gas station and convenience store, where they purchased $2.00 worth of gasoline, and then to a Burger King fast-food restaurant. Then they went to Beacham's Apartments, an off-base apartment complex where appellant left his car, and they took a taxi onto Camp Geiger, arriving at about 3:00 a.m. on the morning of January 12, 1990.

In support of his alibi, appellant presented the testimony of several witnesses who saw him at Rich's club. LCpl Fowler testified that he was with appellant the entire evening and the he and appellant were not involved in the robbery. LCpl Phillips testified that he saw appellant at Rich's club between 11:30 p.m. and midnight but could not say when appellant left the club. LCpl Taylor's stipulated testimony was that he saw appellant at Rich's club at about 1:00 a.m. and later at the Burger King. LCpl Rembert's stipulated testimony was that he saw appellant at Rich's club

on the night of January 11, but that he could not recall when he saw him.

In support of his claim that he went from Rich's club to the Scotchman convenience store, appellant presented the testimony of Ms. Brooks, a young woman who saw LCpl Fowler at Rich's and saw appellant at the Scotchman after Rich's closed. Another young woman, Ms. Hightower, testified that she saw PFC Bell, one of appellant's companions, at the Scotchman. A Scotchman employee, Mr. Pearson, testified that a group of black males came into the store and purchased $2.06 worth of gasoline. He was unable to identify appellant as one of the males he saw. Appellant presented a store receipt showing two purchases of $2.06 worth of gasoline purchased at 1:49 a.m. and 1:56 a.m. The gasoline was sold at a discount, so that a $2.06 purchase would actually cost $2.00.

To support his claim that he and his companions went from the Scotchman to a Burger King restaurant, appellant presented a receipt showing a purchase of food at 2:21 a.m., the testimony of Cpl Hampton, and the stipulated testimony of LCpl Taylor.

To rebut appellant's alibi, the prosecution presented a sign-in log from Rich's, on which appellant's and LCpl Fowler's names do not appear. In response, the defense presented several witnesses who testified that the sign-in policy was not always enforced.

The prosecution also presented the testimony of Mr. Tim Newton, a taxi driver recently released from active duty as a Marine. Mr. Newton testified that he picked up five Marines from the barracks of the 3d Battalion, 6th Marines, at Camp Geiger, between 8:00 p.m. and 10:00 p.m. on January 11, 1990. He took them to Beacham's Apartments

outside Camp Geiger. He heard one of them say, "Take my car, I'm going to Rich's lounge." He saw the same Marines again between 3:00 a.m. and 4:00 a.m. on January 12 at an off-base cab stand. One Marine asked him to follow them to Beacham's Apartments "so they could put his car back." Mr. Newton took the Marines from Beacham's Apartments onto Camp Geiger. At the gate, he had his passengers execute a "night log," which he gave to the military police (MP) at the gate. The log lists the passengers as appellant, LCpl Fowler, PFC Bell, PFC Ratliff, and Private Smith. Mr. Newton testified that, as he drove into the quadrangle near barracks 544, he heard one of the Marines say, "Hey guys, we can't jump Tim because he's bigger than us - he's bigger than all of us and besides that, he's black, but if he wasn't, we'd still jet on his ass."

ISSUE I: APPELLANT'S ADMISSIONS

Sergeant (Sgt) Davis, an MP from Marine Corps Air Station, New River, responded to a request from Camp Lejeune for assistance in investigating the robbery. Sgt Davis had received only a general description of the suspected robbers. They were described as five black males, medium build, wearing civilian clothing, and having haircuts "that a Marine would wear, similar to like a high and tight type haircut, neatly groomed."

At about 3:00 a.m. Sgt Davis observed appellant and four other black males exiting a taxi near barracks 544. As he drove his vehicle close to the five men, someone said, "Here come the MP's, let's go," and two men ran into the barracks. Sgt Davis stopped the remaining three, identified them from their military identification cards, and told one of them to bring the other two men out of the barracks. After the three men came out of the barracks, Sgt Davis asked them where they had been, and they told him that they had

been to a club. The men were neatly dressed in civilian clothing. One man's shoes were muddy. Sgt Davis could smell alcohol on some of them. Initially they were nervous, but them calmed down and were cooperative.

As Sgt Davis was talking to the five men, the Officer of the Day (OOD) approached. Sgt Davis asked the OOD if he knew the five men, and he said he did. Sgt Davis told the OOD, "[I]f we need to talk to them later on, then we'll get up with them, or we'll have you, you know, get them back out here." The five men then began walking toward the barracks.

At about 3:10 a.m., LCpl Sepulvado arrived on the scene. LCpl Sepulvado was an MP from Camp Lejeune. He had responded to the original robbery report and was patrolling the Camp Geiger area. As the five men were walking away, LCpl Sepulvado told Sgt Davis that he needed "to talk to them." They were brought back, and LCpl Sepulvado filled out "stat sheets" on each man. The "stat sheets" contained identifying information and answers to "routine questions of where you've been, what are you doing, where were you in the last few minutes." He asked for identification cards, but none of the five men produced them. At trial LCpl Sepulvado did not explain the lack of identification, except to comment that "normally Marines don't carry ID cards out in town in civilian clothes." He obtained the identifying data from the five men in response to questions, and in the process he incorrectly listed appellant's military grade as lance corporal instead of private.

LCpl Sepulvado listed appellant and his four companions in the "victim/suspect" line of the "stat sheet". He wrote the following in the "details" section of appellant's "stat sheet": "Beacham Apt's is were [sic] subject state a taxi picke [sic] him up." LCpl Sepulvado made no entry on the

"incident" line of the "stat sheet" because, in his view, "no one as far as I knew was charged with anything."

LCpl Sepulvado's testimony was offered by the prosecution to rebut appellant's alibi defense by suggesting that appellant was evasive when questioned about his whereabouts. Trial counsel asked LCpl Sepulvado what appellant said in response to questions about his whereabouts and activities. Over defense objection, LCpl Sepulvado testified that he asked appellant where he had come from in the taxi, and appellant responded, "Beacham's Apartments." When asked where the apartment was, appellant said he did not know. When asked what he was doing at the apartment, appellant said, "[T]hat's where the taxi picked him up." Upon further questioning, appellant said he did not know anyone at the apartment, was not attending a party there or staying there, but, "that's just where the taxi picked him up at." Asked where he had been before going to Beacham's Apartments, appellant simply said that he was "out in town." LCpl Sepulvado asked what clubs or restaurants he visited, and appellant "simply stated just out in town" but did not name any specific places.

Defense counsel initially objected to LCpl Sepulvado's testimony on the grounds that it had not been disclosed to the defense and it was not preceded by Article 31(b)[2] warnings. Because of the non-disclosure, the military judge would not permit the testimony during the prosecution's case-in-chief, but he permitted LCpl Sepulvado's testimony in rebuttal. When LCpl Sepulvado was tendered as a rebuttal witness, defense counsel appears to have withdrawn his Article 31(b) objection, telling the military judge, "Sir, after reviewing the law, I will not object to admission of the statements for those purposes." After

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[2]UCMJ, 10 USC § 831(b).

then briefly arguing that the initial investigatory stop by Sgt Davis was followed by a second interview by LCpl Sepulvado where "they didn't have a choice in the matter ... it wasn't up to them whether or not they could leave," defense counsel did not renew his objection.

Appellant now contends that LCpl Sepulvado should have given Article 31(b) warnings because he was a suspect and in custody when LCpl Sepulvado questioned him. The Government argues that appellant waived the Article 31(b) warnings because he was a suspect and in custody when LCpl Sepulvado questioned him. The Government argues that appellant waived the Article 31(b) issue by failing to object. The Government further argues that Article 31(b) warnings were not required because appellant was not a suspect and was not in custody.

This may well be an appropriate case for waiver, based on defense counsel's apparent acquiescence, "after reviewing the law," in the military judge's determination that Article 31(b) warnings were not required; but we do not resolve this issue on the basis of waiver. *See* Mil.R.Evid. 103(a)(1), Manual for Courts-Martial, United States (1995 ed.). We hold that, even if the issue was not waived, the military judge did not err in admitting the evidence.

We first hold that the Fifth Amendment was not implicated, because this was not a custodial interrogation. In *United States v. Schake*, 30 MJ 314, 318 (CMA 1990), we adopted the Supreme Court's definition of custodial interrogation as a situation where a suspect "reasonably believed that his 'freedom of action [was] curtailed to a "degree associated with formal arrest."'" *See Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984), quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983).

In *United States v. Fagan*, 28 MJ 64, 69 (CMA 1989), this Court also recognized that military persons enjoy considerably less freedom of movement than civilians. Thus, we hold that the brief detention of appellant by Sgt Davis and LCpl Sepulvado for the purpose of ascertaining his identity and briefly questioning him about his whereabouts falls short of a deprivation of freedom "associated with formal arrest" or a custodial interrogation.

We turn next to appellant's claim that he was a "suspect" within the meaning of Article 31 and should have been advised of his rights. We hold that appellant was not a suspect.

Whether a person is a suspect is a question of law that we review *de novo*. *United States v. Davis*, 3 MJ 337, 340 (CMA 1993), aff'd, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The Court of Criminal Appeals concluded that the information available to LCpl Sepulvado would not even justify a *Terry* stop. *See* Mil.R.Evid. 314(f)(1); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1858, 20 L.Ed.2d 889 (1968). We agree.

Based on the evidence available to LCpl Sepulvado, we hold that the investigation had not sufficiently narrowed to make appellant a suspect. *See Davis*, 36 MJ at 341. LCpl Sepulvado knew only that the alleged assailants were black males in civilian clothing who, based on their short haircuts, probably were Marines. LCpl Sepulvado's questioning of appellant and his four companions did not amount to a *Terry* stop. It was no more than an attempt tot find witnesses to the crime and a preliminary effort to screen out those who could not have been involved. Indeed, appellant's claim of alibi and neat civilian clothing tended to exclude him as a potential suspect.

LCpl Sepulvado did not regard appellant as a suspect and did not think that his contact with appellant warranted an entry in the incident block of the "stat sheet." Because the investigation was still in the beginning stages of preliminary screening of potential witnesses and suspects, we agree with the court below that the information available to LCpl Sepulvado falls short of the reasonable suspicion required for a *Terry* stop occurred. Accordingly, we hold that appellant was not a suspect within the meaning of Article 31.

ISSUE II: IMPEACHMENT OF PROSECUTION WITNESS

LCpl Copeland was the only government witness to identify appellant as an assailant. The military judge granted a government motion *in limine* to prevent defense counsel from asking LCpl Copeland about his adjudication as a juvenile offender. Defense counsel offered no documentary evidence of the juvenile adjudication but merely referred to LCpl Copeland's testimony at the Article 32 investigation "that he and a friend of his or his friend stole some jewelry from an individual, and he had hidden it and the police had found out about it." Copeland's testimony at the Article 32 was as follows:

> My and a friend had went out, sir, and my friend grabbed a chain off another guy. He gave me the chain and I went home. He got caught and the police came and picked me up, sir.

LCpl Copeland testified at the Article 32 that he was "given youthful offender status ... and put on probation." he was 15 or 16 years old at the time. LCpl Copeland was 20 years old when he testified at the Article 32.

Appellant contends that the military judge violated his right of confrontation under the Sixth Amendment by depriving him of the opportunity to impeach LCpl Copeland with the juvenile adjudication. The Government contends that the military judge did not abuse his discretion.

If LCpl Copeland had been convicted of larceny as an adult, his conviction may well have been admissible to attack his credibility under Mil.R.Evid. 609(a). However, Mil.R.Evid. 609(d) provides that "[e]vidence of juvenile adjudications is generally not admissible under this rule." The rule gives the military judge discretion to admit evidence of a juvenile adjudication if two conditions are met: (1) "if conviction of the offense would be admissible to attack the credibility of an adult"; and (2) "the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." *Cf. United States v. Hughes*, 26 MJ 119 (CMA 1988)(juvenile adjudication not a "conviction" under RCM 1001(b)(3)(A), Manual, *supra*).

In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Supreme Court held that a defendant's Sixth Amendment right of confrontation was violated when he was precluded from cross-examining a key witness against him. In *Davis* the defendant did not offer the juvenile adjudication to impeach the witness' general character for truthfulness but, rather, to show that the witness was biased. The defense theory was that the witness, who was still on probation, made a hasty identification of the defendant, under pressure from the police, because he was afraid of having his probation revoked.

The Supreme Court distinguished between evidence of a crime as "a general attack on the credibility of the witness," and a "more particular attack" by cross-examining the witness

about "possible biases, prejudices, or ulterior motives". *Id.* at 316, 94 S.Ct. at 1110. The case before us involves the former; *Davis* involved the latter.

Appellant does not argue that LCpl Copeland was biased or prejudiced against him, but only that he was mistaken. Unlike the situation in *Davis*, the defense did not identify any ulterior motive for LCpl Copeland's identification of appellant. *See United States v. Ciro*, 753 F.2d 248, 249 (2d Cir. 1985) (distinguishing *Davis* on same basis but taking prosecution to task for injecting unnecessary appellate issue). To the contrary, Copeland was a reluctant witness who delayed identifying appellant because he did not want to get involved.

A military judge has broad discretion regarding admissibility of impeachment evidence. *United States v. Sitton*, 39 MJ 307, 310 (CMA 1994). Based on defense counsel's sparse offer of proof, it would appear that Copeland's involvement in the juvenile offense was tangential, happened several years before the court-martial, and furnished only general evidence on his credibility as opposed to specific bias or prejudice. Because of the tangential nature of the evidence, its admission was not "necessary for a fair determination of the issue of guilt or innocence." Mil.R.Evid. 609(d). Accordingly, we hold that the military judge did not abuse his discretion by excluding the evidence of LCpl Copeland's juvenile adjudication.

ISSUE III: IMPEACHMENT OF APPELLANT

Before entry of pleas, defense counsel made a motion *in limine* to preclude the prosecution from impeaching appellant with evidence of two juvenile adjudications for battery and a special court-martial conviction for assaulting

an NCO. The Government responded that it would not ask appellant about his juvenile adjudications, but that it would cross-examine him about his special court-martial conviction if he testified. The military judge declined to rule on the motion, saying that he was unable to weigh the probative value and prejudicial impact of the evidence unless appellant testified. He gave defense counsel the option to renew the motion *in limine* "just before the accused testifies."

At the end of the defense case on the merits, defense counsel renewed his motion. The military judge denied the motion and offered to give a limiting instruction if appellant testified and evidence was elicited. Defense counsel then announced that, 'but for this ruling," appellant would have testified, but that he "has decided that he will not testify" in light of the military judge's ruling on the motion.

Appellant now contends that the possible admission of the impeachment evidence precluded appellant from testifying. The Government argues that the military judge did not abuse his discretion by denying the defense motion *in limine*. We hold that the military judge did not abuse his discretion.

The version of Mil.R.Evid. 609 in effect when appellant was tried provided in pertinent part as follows:[3]

> (a) *General rule*. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited

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[3]The December 1, 1990, amendment to Fed.R.Evid. 609 became part of the Military Rules of Evidence by operation of law on May 30, 1991. *See* 111 S.Ct. 39 (1990)(preface) and Mil.R.Evid. 1102. This amendment was not applicable to appellant's trial, which was completed on April 14, 1990.

> from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and the military judge determines that the probative value of admitting this evidence out-weighs its prejudicial effect to the accused, or (2) involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

Manual for Courts-Martial, United States, 1984 (Change 3 June 1, 1987).

Even if evidence is relevant, it may be excluded under Mil.R.Evid. 403 "if its probative value is substantially outweighed by the danger of unfair prejudice...." A military judge has "broad discretion" in balancing the probative value against the prejudicial impact of impeachment evidence based on previous convictions. The military judge's ruling will not be disturbed on appeal "absent a clear showing of abuse of discretion." *United States v. Brenizer*, 20 MJ 78, 82 (CMA 1985). The balancing test under Mil.R.Evid. 609 is less stringent than under Mil.R.Evid. 404(b). *See* 4 Weinstein's Federal Evidence, § 609.04[2][a][i] (2d ed.1997), citing *United States v. Valencia*, 61 F.3d 616, 618-19 (8th Cir. 1995)(prior conviction admissible under Rule 609 even though excluded under Rule 404(b)).

In *Luce v. United States*, 469 U.S. 38, 43, 105 S.Ct.

460, 464, 83 L.Ed.2d 443 (1984), the Supreme Court held "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." In *United States v. Cofield*, 11 MJ 42 (CMA 1981), this Court had held that an issue of improper impeachment with a prior conviction was preserved for review even though the accused had not testified.

This Court addressed the impact of *Luce* on *Cofield* in *United States v. Sutton*, 31 MJ 11, 18 (CMA 1990), and held that "reviewability of *in limine* rulings in courts-martial tried after the date of this opinion will be controlled by *Luce* and future decisions of the Supreme Court." Appellant's case is not affected by *Sutton*, however, because it was tried 5 months before *Sutton*. Thus, we hold that the issue was preserved, even though appellant did not testify.

In *Brenizer*, 20 MJ at 80, this Court listed the following five factors relevant to balancing, recognizing that there may be other pertinent factors in a given case:

> (1) The impeachment value of the prior crime.
> (2) The point in time of the conviction and the witness' subsequent history.
> (3) the similarity between the past crime and the charged crime.
> (4) The importance of the [accused's] testimony.
> (5) The centrality of the credibility issue.

Applying the *Brenizer* factors to this case, we conclude that the military judge did not abuse his discretion. Appellant's conviction had some impeachment value. Although it was not an offense involving dishonesty, it does reflect lack of respect for the established order and would be relevant in determining whether appellant would "take lightly his obligation to testify truthfully" and place his own interests

above the integrity of the judicial system. *See Brenizer*, 20 MJ at 81. This factor appears to slightly favor admissibility. *See* Weinstein, *supra* at § 609.04[2][a][i] and [ii].

The conviction was recent, slightly more than a year before the court-martial. This factor gives more probative value to the evidence and weighs in favor of admissibility. *Id.* at § 609.04[2][a][iv].

Appellant's personal testimony would have been helpful to his defense, but it was not the linchpin of the defense. His alibi had some holes in it, but it was supported by numerous other witnesses and documentary evidence. Appellant's ability to establish his defense without testifying weighs in favor of admissibility. *Id.* at § 609.04[2][a][v], citing *United States v. Causey*, 9 F.3d 1341, 1344 (7th Cir. 1993) (defendant did not need to testify to raise defenses).

This case was not a one-on-one swearing contest, but appellant's credibility woul have been important if he had testified. LCpl Copeland's eye-witness identification was contradicted only by LCpl Fowler, appellant's alleged co-actor. This factor weighs in favor of admissibility. *Id.* at § 609.04[2][a][vi].

In *Cofield*, we recognized the difficulty of evaluating the impact of the military judge's ruling where an accused does not testify. We observed:

> One reason for judicial reluctance to allow review under circumstances like those of the case at bar is the difficulty of determining somewhat in the abstract whether an erroneous ruling has been made. For example, even if we rule that usually a conviction by summary court-martial is inadmissible to impeach an accused after he has testified on direct examination,

> there may be extraordinary circumstances when such a conviction would be admissible--for example, if an accused uses inadmissibility as a sword, rather than a shield, by testifying on direct examination that he has never been convicted of an offense by any kind of court-martial. Similarly, the difficulty of establishing whether an erroneous ruling prejudiced an accused who has not taken the stand undoubtedly has helped induce some courts to forestall the inquiry as to prejudice by simply refusing to review the ruling of the trial court unless the appellant has testified.

11 MJ at 426-27 (citations omitted).

The military judge expressed the same frustration in this case when he responded to defense counsel's assertion that the probative value of appellant's conviction was substantially outweighed by the potential for prejudice. The military judge stated, "I can't tell that until I hear him testify, counsel." Thus, while we hold that the issue was preserved for review, we are unable to find a clear abuse of discretion without seeing how strong and convincing appellant's testimony would have been if he had testified. *See generally United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (encourages judges to make explicit finding that probative value outweighs prejudice; encourages defense counsel to point out specific prejudicial impact).

ISSUE IV: FAILURE TO SEQUESTER GOVERNMENT WITNESS

On the fourth day of the court-marital, but before entry of pleas or introduction of evidence on the merits, trial counsel announced that SA Biller, a criminal investigator, would be sitting with trial counsel as a government

representative for the remainder of the trial, in accordance with Mil.R.Evid. 615. Defense counsel objected on the ground that SA Biller was a potential government witness. Trial counsel conceded that SA Biller was a possible government witness. SA Biller had already testified in connection with a defense motion to suppress the testimony of LCpl Copeland. The basis for this motion was an assertion that SA Biller had suggested to Copeland that appellant was one of the assailants.

During the trial on the merits, SA Biller was called as a prosecution witness, and the defense renewed its objection. Trial counsel represented that SA Biller would not testify about any matters covered by preceding witnesses. The defense argued that its ability to cross-examine SA Biller had been compromised. The military judge overruled the defense objection.

On direct examination SA Biller described his examination of the crime scene on the morning of January 12; his apprehension of appellant and PFC Smith in the barracks; his seizure of clothing from the living areas of appellant, Smith, and Bell; and his seizure of the Burger King receipt from Bell's area.

Cross examination of SA Biller focused on the lighting conditions at the crime scene; LCpl Copeland's reluctance to identify the assailants; and contradictory and false information initially provided by Copeland. SA Biller also described appellant's alibi and his interviews with the witnesses who supported the alibi. In this respect, SA Biller's description of appellant's alibi was consistent with the defense case.

On redirect SA Biller identified the sign-in log from Rich's Lounge. On recross, SA Biller described the victims'

uncertainty about the identity or description of their assailants.

Notwithstanding its previous objection to SA Biller testifying after having heard the preceding testimony, the defense also called SA Biller as a witness on the merits to establish the time of the offense, the time of appellant's return to the base, LCpl Copeland's lack of complete disclosure about what he had witnessed, and the driving time and distance from Rich's Lounge, the Scotchman, and the Burger King to Camp Geiger. Twice during his testimony, defense counsel asked him to recall and comment on the testimony of witnesses who had preceded him.

Appellant now asserts that the military judge's failure to exclude SA Biller from the courtroom was prejudicial because it compromised the defense theory that SA Biller had unfairly and improperly suggested to LCpl Copeland that appellant was the assailant. Appellant argues that, at a minimum, the military judge should have required that SA Biller testify first. The Government argues that appellant has been unable to point to anything in SA Biller's testimony indicating that it was influenced by his ability to hear the testimony of the witnesses who preceded him.

Mil.R.Evid. 615 mandates sequestration of witnesses at the request of either side, but "does not authorize exclusion of ... a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel ...." the purpose of the sequestration rule is to prevent witnesses from shaping their testimony to match another's and to discourage fabrication and collusion. *United States v. Croom*, 24 MJ 373, 375 (CMA 1987).

Once trial counsel designated SA Biller as a

government representative, the military judge had little discretion to exclude him. *See* Drafters' Analysis of Mil.R.Evid. 615, Manual, *supra* (1995 ed.) at A22-47 (military judge "lacks any discretion" to exclude witnesses covered by Mil.R.Evid. 615(2) and (3) unless constitutional right to fair trial would be violated). Although appellant argues that the military judge could have required SA Biller to testify first, defense counsel did not suggest that alternative. Upon questioning by the military judge, defense counsel was unable to articulate how SA Biller's testimony would have been influenced by his presence in the courtroom.

The primary focus of the defense attack on SA Biller was to suggest that he had contaminated the eye-witness identification by LCpl Copeland, but SA Biller had already testified on that issue at an Article 39(a)[4] session before he took his seat at the prosecution table. There is no evidence that SA Biller's description of the crime scene, identification of documentary and real evidence, or description of Copeland's reluctance to identify the perpetrators was in any way contaminated by his having heard the testimony of other witnesses. We hold that the military judge did not abuse his discretion.

DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges CRAWFORD and EFFRON concur.

SULLIVAN, Judge (concurring in the result):

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[4]UCMJ, 10 USC § 839a).

Issue I can be resolved on the basis of waiver. Defense counsel affirmatively waived his objection to admission of the "stat sheet" evidence. Moreover, appellant used this evidence to present his defense of alibi to the members. Nevertheless, I disagree with the majority's "beginning stages of preliminary screening of potential witnesses an suspects" rationale. It ignores the express language of Article 31, UCMJ ("may interrogate, or request any statement"). *See United States v. Schake*, 30 MJ 314, 317 (CMA 1990).

Issue II also is decided by the majority on a questionable basis. The Supreme Court in *Davis v. Alaska*, 415 U.S. 308, 319, 94 S.Ct. 1105, 1111-12, 39 L.Ed.2d 347 (1974), did not make the distinction urged by the majority although lower appellate courts have. *See United States v. Williams*, 963 F.2d 1337, 1340-41 (10th Cir. 1992). In any event, I am not persuaded that such an error in the preclusion of this impeachment evidence prejudiced appellant.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

D.C. LARSON E.W. WELCH
P.J. McLAUGHLIN

UNITED STATES

v.

Kelsey A. Miller, 593 09 6507
Private (E-1), U.S. Marine Corps

NMCM 91 00783 Decided 15 September 1995

Sentence adjudged 14 April 1990. Military Judge: R.E. Ouellette. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Fleet Marine Force, Camp Lejeune, NC.

WILLIAM J. HOLMES, Esquire, Civilian Defense Counsel *LT PHILIP SUNDEL*, JAGC, USNR; *LT ALICE B. LUSTRE*, JAGC, USNR; *LT RUTH M. MEDEIROS*, JAGC, USNR; and *LT RANDALL L. CHAMBERS*, JAGC, USNR, Appellate Defense Counsel

LCDR J. RICHARD CHEMA, JAGC, USN; *LT RALPH G. STIEHM*, JAGC, USNR; *LT PAUL JONES*, JAGC, USNR; *CDR JOHN P. TOUHY*, JAGC, USNR, and *Col T.G. Hess*, USMC, Appellate Government Counsel

McLAUGHLIN, Senior Judge:

In a 6-day general court-martial before officer members, the appellant was found guilty, contrary to his pleas, of one specification each of conspiracy to rob, robbery, and assault with intent to commit robbery in violation of Articles 81, 122, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 881, 922, 934. He was sentenced to a dishonorable discharge, confinement for 10 years, a fine of $235.00, and forfeiture of all pay and allowances. The sentence was approved by the convening authority and appropriate portions ordered executed on 11 March 1991. The appellant has assigned 10 errors in the case.[1] For the

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[1] I. THE EVIDENCE OF RECORD IS NOT SUFFICIENT TO ESTABLISH APPELLANT'S GUILT TO THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT EITHER FACTUALLY OR AS A MATTER OF LAW.

II. THE MILITARY JUDGE COMMITTED PREJUDICIAL AND CONSTITUTIONAL ERROR BY REFUSING TO PERMIT THE DEFENSE ACCESS TO ANY EXPERT ON EYEWITNESS IDENTIFICATIONS WHICH WAS THE PIVOTAL ISSUE OF THE CASE, EITHER AS A WITNESS ON THE MERITS TO ASSIST THE MEMBERS IN ADDRESSING THIS ISSUE OR TO ASSIST DEFENSE COUNSEL IN PRETRIAL PREPARATION, SUCH EXPERT TESTIMONY AND ASSISTANCE BEING FACTUALLY AND LEGALLY REQUIRED FOR APPELLANT TO PREPARE AND PRESENT AN ADEQUATE DEFENSE.

III. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING ADMISSIONS MADE BY APPELLANT DURING A CUSTODIAL INTERROGATION BY A MILITARY POLICEMAN IN THE EXECUTION OF HIS LAW ENFORCEMENT DUTIES WHERE THE

APPELLANT WAS NEVER ADVISED OF HIS ARTICLE 31 OR FIFTH AMENDMENT RIGHTS.

IV. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY REFUSING TO SUPPRESS AN IDENTIFICATION WHICH WAS UNDULY SUGGESTED BY AND DERIVED FROM THE ILLEGAL APPREHENSION OF APPELLANT AS FOUND BY THE MILITARY JUDGE.

V. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE OF A STATEMENT WHICH WS USED SOLELY TO DEMONSTRATE APPELLANT'S "BAD CHARACTER" AND PROPENSITY TO COMMIT THE CHARGE OFFENSES.

VI. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY REFUSING TO ORDER THE PERSONAL APPEARANCE OF VARIOUS DEFENSE WITNESSES WHOSE TESTIMONY WAS DIRECTLY MATERIAL AND RELEVANT TO THE DEFENSE CASE ON FINDINGS.

VII. THE MILITARY JUDGE COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY REFUSING TO ALLOW APPELLANT TO IMPEACH THE SOLE PROSECUTION WITNESS WITH A CONVICTION AND OTHER ACTS OF DISHONESTY WHICH ARE PERMITTED UNDER THE RULES OF EVIDENCE AND REQUIRED BY THE SIXTH AMENDMENT.

VIII. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY REFUSING TO APPLY THE CORRECT LEGAL STANDARD AND PREVENTED APPELLANT FROM TESTIFYING ON HIS OWN BEHALF.

IX. THE MILITARY JUDGE COMMITTED

following reasons, we find the assignments of error to be without merit. As to the appellant's first assigned error, we conclude that the evidence is legally sufficient to establish the appellant's guilt of the offenses of which he was found guilty, and we are, ourselves, convinced beyond a reasonable doubt of his guilt. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

EYEWITNESS EXPERT ASSISTANCE AND EXPERT WITNESS

The appellant's second assignment of error states that the military judge erred in denying eyewitness expert assistance and testimony. Wed disagree and find no error in the military judge's ruling.

The eyewitness identification of the appellant was a critical issue in this case. LCpl C, an eyewitness to the attack, was to testify at trial that appellant was one of the attackers. Appellate Ex. XI at 123. This exhibit incorporates the Article 32, UCMJ, testimony of LCpl C for purposes of the motion. The appellant requested expert pretrial assistance

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PREJUDICIAL ERROR BY PERMITTING NIS AGENT BILLER TO BE DESIGNATED AS A GOVERNMENT REPRESENTATIVE AND TO LISTEN TO ALL OF THE TESTIMONY AND CROSS-EXAMINATION BEFORE TESTIFYING AND INTERPRETING AND GIVING HIS IMPRESSIONS OF THAT EVIDENCE.

X. THE MILITARY JUDGE ABANDONED THE PROPER ROLE OF A MILITARY JUDGE AS AN IMPARTIAL AND NEUTRAL ARBITER OF THE CASE AND ASSUMED THE ROLE OF A PARTISAN ADVOCATE FOR THE GOVERNMENT WHICH DEPRIVED APPELLANT OF A FAIR TRIAL.

and expert witness services in the area of eyewitness identification. The request was denied by the convening authority. Appellate Exhibits VI-VIII are copies of literature on the subject of eyewitness accuracy. The basis of the denial for expert assistance in preparing for trial was that: (1) This was not an interracial identification. The appellant and the eyewitness are both black, (2) There were no demonstrable scientific principles utilized by the proposed expert, (3) Perceptions, recollections, and stress in eyewitnesses are within the ability of the average layman and subject to cross-examination, (4) The proposed expert would invade the province of the jury and create a substantial danger of undue prejudice and confusion, and (5) There was a substantial chance the expert testimony would only result in the expert testifying as to the truthfulness of the eyewitness. Record at 51-52; *see* Mil. r. Evid. 403, 703(d).

While returning to his barracks after a night at the movies, LCpl C observed a group of five individuals walking near the back gate toward the barracks area. LCpl C had not been drinking alcoholic beverages that night; and, in fact, he is a non-drinker. Appellate Ex. XI at 127. He kept an eye on them, saw one peering around the corner of a barracks, and then saw the group start running. LCpl C wanted to see what was happening, so he ran through the barracks front door to the back where he thought the group of five had gone. *Id.* at 131-32. The area he entered from the back of the barracks was a lighted quad area. *Id.* LCpl C saw two individuals from his platoon being attacked by five blacks. He immediately ran into the barracks to alert the duty officer and grabbed a pole as a weapon to help the victims because he saw that the attackers were hitting them with sticks. *Id.* at 133-35. When LCpl C returned with the rod, the attackers were fleeing and two of them ran by him at 6-7 feet and he saw their whole faces, but was uncertain as to their clothing. *Id.* at 134-35. This all happened within 15-20 seconds. *Id.*

at 156.

From 12 January to 17 January, LCpl C was interviewed several times. He never identified the attackers until the appellant had been placed in the brig. He said h didn't know the names of the attackers. On 17 January and thereafter, he admitted he knew the two attackers he saw by name. He knew them prior to the night/morning of the attack. in fact, the two attackers he recognized lived in the same barracks as he did and were in the same company. He said he didn't make positive identification because he didn't want to get involved. *Id.* at 160. He denied that he ws forced or pressured into naming the appellant as an attacker. *Id.* at 159-60; Record at 88-121; 221-234.

We review the military judge's ruling for abuse of discretion. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A.), *cert. denied*, 114 S.Ct. 182 (1993). We find no abuse of discretion because, in this case, unlike the voluminous case law cited by both sides and the literature attached to the record as appellate exhibits, the witness knew the appellant. The appellant was not a stranger to the witness, he was previously known by the witness, not just casually seen sometime before or after the robbery. Additionally, the need for expert assistance was shown to be unnecessary by the ample, easily read, and easily understood literature available on the subject as shown in Appellate Exhibits VI-VIII. *United States v. Kelly*, 39 M.J. 235, 237 (C.M.A.), *cert. denied*, 115 S.Ct. 324 (1994); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A.), *cert. denied*, 479 U.S. 985 (1986).

We also note that amid the on-going debate concerning the use of eyewitness-testimony experts there is ample authority that the subject of accuracy of eyewitness testimony is informative and can be conveyed to the members

through other means such as tailored instructions and voir dire. *United States v. Rincon*, 28 F.3d 921, 925 (9th Cir. 1994); *United States v. Garcia*, 40 M.J. 533, 538-39 (A.F.C.M.R. 1994). In the appellant's case, the military judge informed the members of possible pitfalls in eyewitness identifications. Record at 195. Additionally, he gave an extensive instruction on factors to consider when evaluating eyewitness testimony. Record at 948-49.

SUPPRESSION FACTS

With regard to Assignment of Error III, the pertinent facts are that on the morning of 12 January 1990, two Marines were attacked at Camp Geiger, near Camp Lejeune, North Carolina, at about 0130. The attack occurred outside barracks HP-544 and robbery was its object. The attack was carried out by five black Marines, unidentified by the victims, but seen by others.[2] Sometime later, while the police authorities were on the look-out for five black men travelling together, the appellant, who is black, and four of his friends, also black, arrived at barracks HP-544 by taxi at about 0310. They were observed alighting from the cab by a military police [MP] sergeant from the Marine Corps Air Station, New River [Sgt D]. Based on a request for assistance from the Camp Lejeune military police, who had reported a robbery at Camp Geiger by five black Marines described as: "Haircuts . . . a Marine would wear," "medium build . . . civilian clothes," "brown coat . . . dark clothing," Sgt D had motored over to Camp Geiger from the air station to patrol. Record at 417-19. Sgt D approached the group at the entrance of the barracks to "make contact" with them. Record at 417. As he pulled his vehicle up to the group, someone from the area of the group said: "Here come the MP's, let's go." *Id.* Two of the group ran off into the

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[2] This witness identification is the object of Assignment of Error II.

building, and Sgt D stopped the other three who were walking quickly toward the barracks. Sgt D got the identification cards of the three and sent one in to get the other two members of the group. Quickly thereafter, Sgt D was talking with all five Marines "about what had happened, or where they had been that night, and they told me they had been to a club. That's about it . . . ." Record at 417-18. Sgt D observed that the group seemed to have been drinking, the five were neatly dressed, and, except for a pair of muddy shoes, had no torn clothing, cuts, bruises, soil, or scarred knuckles. Record at 421. The Officer of the Day [OOD] joined the conversation and, after Sgt D determined that the OOD knew the five Marines, Sgt D explained the reports of robbery and said to the OOD, "okay, if we need to talk to them later on, then we'll get up with them, or we'll have you . . . get them back out here." Record at 418. Sgt D let them go, but then an MP lance corporal [LCpl S] from Camp Lejeune arrived.

LCpl S had earlier reported to the robbery crime scene and was released to patrol. When he learned that air station MP's, who were back-up and not the primary investigators, had detained five black Marines at barracks HP-544 on board Camp Geiger, he went to the barracks and made contact with Sgt D. Record at 429. As LCpl S approached the barracks, he observed the group of five Marines being released into the barracks. LCpl S confirmed with Sgt D that the five Marines entering the barracks were the five that were reported by radio to be detained and LCpl S had them all quickly brought back to the entrance of the barracks to interview them separately. *Id.* at 429-30, 444. The purpose of the individual interviews was to fill out required STAT SHEETS, which are attached to the record of trial as Prosecution Exhibit 12. Record at 440. These STAT SHEETS contain identifying information on the subject/victim, and include an area for narrative entries

entitled DETAILS. According to LCpl S, the STAT SHEETS are prepared ("taken" is the term used in the testimony) "to let me know the next day or so who that person was in case I am contacted or questioned about it. Also involved are asking simple questions, routine questions of where you've been, what are you doing, where were you in the last few minutes." Record at 430. In the DETAILS section, LCpl S made an awkward entry on the appellant's STAT SHEET that stated: "BEACHAM APT'S IS WERE SUBJECT STATES A TAXI PICKED HIM UP."[3] Prosecution Ex. 12. No motion to suppress or objection was made to these STAT SHEETS under Mil. R. Evid. 304(d)(2) or 311(d) prior to the appellant's plea, and probably for good reason. Rule for Courts-Martial [R.C.M.] 905(b)(3). The STAT SHEETS gave support to the appellant's alibi defense and the clothing descriptions included therein were dramatically different than the clothing descriptions of the robbers.

This pertinent information, and more, came out on direct examination, cross-examination, re-direct, and re-cross of Sgt D and LCpl S. Assignment of Error III arises from the military judge clarifying members' questions put to LCpl S about the whereabouts of the duty NCO during the interviews. As LCpl S explained the mechanics of completing the STAT SHEET, he said: "For instance, Private Miller, he said that he was picked up in a taxi and that's exactly what I noted. Even though I asked several questions, I was never given any answers so I couldn't note anything but what I was told." The military judge then asked: "What do you mean you weren't given any answers?" The defense counsel interjected an objection that the questioning was going beyond the scope of the previous examination and the court excused the members and held an

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[3] Beacham Apartments are located off base.

Article 39(a), UCMJ, hearing. Record at 448-49.

At the hearing, the defense counsel renewed his objection on the grounds that the question was beyond the scope of the prior examination and interjected new objections under relevance and lack of notice of prior statements of the accused.[4] Record at 450-54, 459. This pearl of testimony, which had been rolled out in front of the counsel, members, and military judge as an unexpected surprise at the very end of the testimony of LCpl S, was developed and sharpened into evidence of the appellant's and the other conspirators' vague and obscure answers to the question "Where have you been recently," suggesting the appellant would not or could not specify where he and the others had been -- impacting adversely on the appellant's alibi defense. Ultimately, the objection of substance, that has ripened into Assignment of Error III, was made. That objection requested exclusion of the statements made to LCpl S by the appellant on lack of notice and failure to warn under Article 31(b), UCMJ. During an Article 39(a), UCMJ, hearing, the defense counsel averred that the appellant was a suspect who warranted warnings under Article 31(b), UCMJ. The appellant did not testify on the issue. The military judge was skeptical and stated that "there was [not] anywhere near enough suspicion to give Art. 31 rights." Record at 462. The military judge stated to the defense counsel, "you're saying just a reasonable suspicion requires warning. Is that what you're saying?" Record at 463. The defense counsel answered affirmatively and the military judge overruled the objection to the

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[4] Although no objection under Article 31(b), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 831(b) or the Fifth Amendment had yet been made by the defense, and the trial counsel states that he did not know of this aspect of LCpl S's interview of the appellant, it becomes clear that the basis of this part of the objection is Mil. R. Evid. 304(d)(1) requiring disclosure of statements of an accused under the enumerated circumstances.

testimony on Article 31(b), UCMJ, grounds, but did bar the use of the results of the interviews beyond the information in the STAT SHEETS in the Government's case-in-chief because of the lack of notice to the appellant. The military judge ensured that LCpl S would remain readily available for interview by the parties and emphasized to the defense counsel that the testimony might become relevant for rebuttal to any alibi defense, and that the defense now had notice[5] of the existence of statements by the appellant.

We are not as convinced as the military judge that the decision to forego suppression of the results of LCpl S's interview with the appellant under the Fifth Amendment and Article 31(b), UCMJ, did not waive the issue under applicable law. Mil. R. Evid. 304(d)(2); R.C.M. 905(b)(3). We do however defer to his discretion to hear and rule on the untimely objection. Mil. R. Evid. 304(d)(2) ("the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown"). The appellant's theory of defense was alibi, and these snippets of information on the STAT SHEET, Prosecution Exhibit 12, were words of alibi from the appellant's mouth, without the appellant having to take the stand. Prosecution Exhibit 12 also described the appellant's clothing as very different than the clothing worn by the robbers. It wasn't until the outset of LCpl S's initial testimony, when the trial counsel asked "what was stated during that conversation to you by Private Miller," that the trial defense counsel objected to what he thought were going to be confessions or admissions of the appellant to LCpl S

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[5] At first, the trial counsel had stated that he was surprised about these additional statements of the appellant to LCpl S. During the Article 39(a), UCMJ, hearing, the trial counsel stated that: "I did interview this witness and he did relate some of this stuff which I didn't determine as being relevant and Captain Diaz did have an opportunity to question him on it." Record at 464.

that "the defense has not been made aware of." Record at 431. The trial counsel responded that his questions were designed to have LCpl S attest to what the appellant told him "as to the material that's contained in the stat sheets. I didn't state that he made an admission of guilt or anything." Record at 431. In fact, the trial counsel stated that he wasn't aware that the appellant hadn't answered LCpl S's questions. Record at 450. LCpl S thereafter testified to asking such questions as: "[W]here have you been?", "[W]hat have you been doing tonight?", "What have you been doing for the past 45 minutes?", "Where did you go when you were out?", "What time did you leave the barracks?", "How long have you been here on base?", "Where is the club located?", "How did you get to the apartments?", "How far apart are those places?", "What were you doing at the Beacham Apartments?", "Did you know someone there?", "Were you visiting someone?", "Was there a party?", and "Why were you there?" Record at 438, 449, 455-57, 862. As to the trial counsel's disclosure obligation, under these circumstances, the scope of disclosure by the trial counsel would be any statements recorded, i.e., the STAT SHEETS, the fact that the appellant was interviewed by the military police, and the identity of the MP's. It is thereafter the obligation of the defense to pin down the content of the verbal exchange, and not rely on the trial counsel to do the interviewing. In any case, the military judge fashioned relief for non-disclosure by suppressing the use of the statements on the merits, which was within his discretion. Mil. R. Evid. 304(d)(2)(B).

Having resurrected what might have been waived issues, the military judge proceeded to consider and rule on the motion. His ruling was to overrule the defense objections, including the objection brought under Article 31(b), UCMJ. We hold that appellant was not a suspect and was not in custody when he was questioned by the military police at the barrack's entrance and the military judge was

correct in overruling the defense objection.

Article 31 Issue

Whether a person being interviewed is a "suspect" is a question of law. *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991). The military judge's factual determinations pertaining to what criminal investigators knew at the time of the interview will be upheld unless "clearly erroneous"; but the legal issue whether the person being interviewed was a suspect will be reviewed *de novo*. *Id.*; *United States v. Uribe-Velasco*, 930 F.2d 1029, 1032 (2d Cir. 1991). If a criminal "investigator suspects or reasonably should suspect" a person "of a crime, then rights' warnings are required." *United States v. Schake*, 30 M.J. 314, 317 (C.M.A. 1990).

United States v. Davis, 36 M.J. 337, 340 (C.M.A. 1993), *aff'd on other grounds*, 114 S. Ct. 2350 (1994); *quoted in United States v. Meeks*, 41 M.J. 150, 161 (C.M.A. 1994). Because of the unusual timing of the defense objection, the military judge did not express his ruling in the essential findings format that would be expected if a timely motion to suppress had been made. Mil. R. Evid. 304(d)(4). Nonetheless, we can glean the basis of the military judge's ruling from the facts presented, his statement of the ruling in the record, and findings of fact on a motion to suppress the statement of a cab driver and the identification made by the eyewitness. Record at 224-25, 461-62; *United States v. Mayhugh*, 41 M.J. 657, 661-62 (N.M.Ct.Crim.App. 1994), *petition for review filed*, 42 M.J. 213 (1995). In the appellant's case, the MP's had scant information, except that a group of black males, in mixed civilian/military clothing, with military-type haircuts had robbed or attempted to rob two Marines outside barracks HP-544 at 0130. It is reasonable that MP's would consider and act upon the need to unobtrusively question a group of five black Marines, at

the crime scene, approximately 2 hours after the crime, at 0310, without stamping that group with the label of "suspects." This is especially evident here where, within the span of 10 minutes, the group was questioned at the barracks entrance and were allowed to proceed. Record at 462. LCpl S explained that no entry was made on the "incident" line of the STAT SHEET because "[a]t the time that evening, no one as far as I knew was charged with anything, sir." Record at 448. LCpl S considered the encounter so inconsequential that he did not refer to any of the group as "suspects," made no significant notations in his STAT SHEETS, and did not spontaneously report to the trial or defense counsel that he had considered this group as suspects.

Custodial Interrogation

Additionally, a violation of the appellant's Fifth Amendment right[6] was mentioned once by the defense counsel in his objection. Record at 460. We find that the facts and circumstances described above do not represent custodial interrogation and no violation of the constitutional rights of the accused under the Fifth Amendment occurred. Applying the objective circumstances test of *Stansbury v. California*, 114 S. Ct. 1526 (1994), and considering the unique nature of military service and military installations, we find that it would be unreasonable to conclude that the appellant "*reasonably believed that his 'freedom of action [was] curtailed to a degree associated with formal arrest.*'" *United States v. Schake*, 30 M.J. 314, 318 (C.M.A. 1990)(quoting *United States v. Carter*, 884 F.2d 368, 370 (8th Cir. 1989)).

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[6] We presume that this referred to the MP's failure to warn the appellant that he had a right to remain silent under *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967); *see also* Mil. R. Evid. 305.

Military Judge's Previous Ruling on *Terry*-Type Stop

Before leaving the issue presented by Assignment of Error III, we feel clarity is best served by our addressing what appears to be an anomaly. A major point of the appellant's argument in support of Assignment of Error III is that the military judge found articulable facts supporting a conclusion that the appellant and his four companions were suspects when he ruled on an earlier motion to suppress the testimony of a cab driver. Record at 224. The military judge denied a motion to suppress some evidence which the defense claimed was based on an illegal stop of the group of five. Record at 221-26. *See* Mil. R. Evid. 314(f)(1). The military judge stated that part of the basis for this ruling was Sgt D having

a reasonable suspicion supported by articulable facts that a felony had been committed and was justified in making an investigative stop. Five individuals had assaulted two Marines earlier that evening. When Sergeant [D] observed five individuals exiting a cab, he approached them. The statement of one of those individuals to the effect, "There's the MP's. Let's go," combined with the fact that two of the five ran into the barracks was sufficient cause to stop all five for purposes of investigation. [D] asked them to produce their identification cards and asked them where they were coming from."

Record at 224 (emphasis added). The military judge's ruling involved the application of the Fourth Amendment to the stop of the group by the MP's. *See Terry v. Ohio*, 392 U.S. 1 (1968).

We find that the military judge was correct in denying the motion, but not based on a *Terry*-type stop rationale. Although stops/detentions by law enforcement officers before

or during commission of a crime that do not rise to the level of arrest or custody are permissible under the *Terry* criteria, unlike *Terry*, the appellant's case involves police action after completion of the crime, and our application of *Terry* is filtered through the analysis used in *United States v. Hensley*, 469 U.S. 221 (1985). In *Hensley*, which, unlike *Terry* involved a police stop after the commission of a crime, the Court stated that "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *Hensley*, 469 U.S. at 229. Applying *Hensley* to the facts of the appellant's case, we find no specific and articulable facts that Sgt D had that would allow him to conclude that the appellant and his companions were involved in or wanted in connection with the robbery. Additionally, their conduct at the barracks on the approach of the MP does not rise to the level of criminality being afoot for actual *Terry*-stop purposes. *See* Mil. R. Evid. 314(f)(1).

We are mindful that the Fourth Amendment forbids "not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U.S. 206, 222 (1960). The reasonable test requires balancing "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Hensley*, 469 U.S. at 228. This robbery occurred on board a military installation with controlled access. The robbery took place adjacent to the barracks of the victims. The police were patrolling the area of the robbery when they saw a group of five black males exit a cab at the barracks at approximately 0310. Need we conclude that the MP's could not briefly stop the individuals to determine what they were about? We think not.

In the military, servicemembers rarely enjoy total freedom of

movement. Rather, their place of duty and comings and goings are routinely determined by superiors, with the full backing of criminal sanctions. By donning the uniform, the servicemember knowingly accepts restrictions on liberty and privacy -- in the name of military necessity, effectiveness, and discipline -- that his civilian counterpart would never tolerate. Thus to incorporate civilian standards of freedom of movement wholesale into the military setting would be unrealistic."

United States v. Fagan, 28 M.J. 64, 69 (C.M.A.)(citations omitted), *cert. denied,* 493 U.S. 823 (1989). *See United States v. Phillips*, 30 M.J. 1, 7 (C.M.A. 1990)(asking, without deciding, if, even in the absence of "reasonable suspicion," no Fourth Amendment violation occurs when checking a person's identification on base).

We also look to the alternate basis upon which the Government briefed and argued the admissibility of the testimony of the taxi driver, i.e., inevitable discovery. *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). There is no question that Sgt D observed a group of five black males being dropped off at barracks HP-544 at approximately 0310. The evidence submitted from the cab driver establishes that the cab, driver, and passengers had to be logged in as they entered the base. Appellate Ex. XVI. The actual TAXI PASSENGER LOG, a Marine Corps Base Camp Lejeune form, is attached as Prosecution Exhibit 11. It contains the cab driver's name, the driver's base operator's number, and cab company. It also lists the name, rank, serial number, unit, and destination of the passengers. *See* Record at 223. Prosecution Exhibit 11 lists the destination as Camp Gieger and the time of entry as 0254. It is beyond cavil that Sgt D, had he chosen not to make contact with the group of five, could and would have easily obtained the above information. The judge found that Sgt D would have easily found the cab-

driver witness and the identities of the five. Record at 224. In fact, Sgt D did not record identification from the group, he only "checked" their identification cards, engaged them in conversation and "scoped out" their demeanor, clothes, physical condition, and asked about their evening activities. Article 32, UCMJ, Investigating Officer's Exhibit 17, which contains the results of interview of Sgt D, incorporated by reference without objection. Record at 156-57; Record at 417-18. As has been noted, it was LCpl S who filled out the STAT SHEETS based on interviews. He asked for identification cards but didn't get any. Record at 433.[7]

Because we find that this evidence "would have been obtained by lawful means even if the [purported] unlawful search or seizure had not been made," it is admissible on that basis. Mil. R. Evid. 311(e)(2); *see United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993); *United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1982).

The appellant never moved to suppress the STAT SHEETS or conversations the group had with LCpl S under the Fourth Amendment or Mil. R. Evid. 311, even when the military judge allowed entry of the Fifth Amendment and Article 31, UCMJ, objections. We believe this was not an *unknowing* failure, but was a deliberate tactical decision to allow the Government to enter Prosecution Exhibit 12. This failure to move or object prior to submission of a plea waives the motion or objection under the Fourth Amendment. Mil. R. Evid. 311(d)(2)-(3).

Finally, suppression of the testimony of LCpl S, as it contained statements of the appellant and the other conspirators evidencing uncertainty about their whereabouts during the evening, would not have produced a different

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[7] The I.D. card situation is not clarified any further in the record.

result. *United States v. Powell*, 40 M.J. 1 (C.M.A. 1994). The appellant was seen committing the robbery by an eyewitness who knew him, and the liberty card of one of the conspirators was found at the scene of the crime.

OUT OF COURT IDENTIFICATION

In his fourth assignment of error, the appellant attacks the admissibility of LCpl C's eyewitness out-of-court identification of the appellant as unduly suggested by and derived from an illegal apprehension of the appellant. Military Rule of Evidence 321, entitled **Eyewitness Identification,** implements the rules of admissibility for Government-conducted identification processes. Because there was no line-up, photo array, show-up, or any other "identification process conducted by the United States or other domestic authorities," as described in Military Rule of Evidence 321, the appellant's argument fails. The appellant contends that his Constitutional due process rights were violated because LCpl C knew the police had focussed on the appellant as a prime suspect in the robbery. In fact, LCpl C saw the appellant being apprehended and taken to pretrial confinement before he named the appellant "100%" as one of the robbers he saw. Record at 224. The judge found that this was a chance encounter, and not a Government orchestrated identification process. Record at 225. Inasmuch as the appellant's case comes to us for review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we are not bound by the military judge's essential findings. Nonetheless, we are generally inclined to give them deference and do so here. *United States v. Nimmer*, 39 M.J. 924, 927 (N.M.C.M.R.), *petition granted*, 40 M.J. 299 (C.M.A. 1994). We find the military judge correctly ruled on the motion and did not abuse his discretion. *United States v. Rhodes*, __ M.J. __ (August 23, 1995); *United States v. Webb*, 38 M.J. 62, 67 (C.M.A. 1993), *cert denied*, 114 S. Ct. 120 (1994).

STATEMENT HEARD BY CAB DRIVER

The appellant's fifth assignment of error involves admission of the following statement *made by the appellant* while travelling back to the barracks at 0300, 12 January, about 2 hours after the charged robbery: "Hey guys, we can't jump Tim because he's bigger than us -- he's bigger than all of us and besides that, he's black, but if he wasn't, we'd still jet on his ass." Record at 405-06. The defense objected to admission of this statement based on relevance and Mil. R. Evid. 403. Record at 226. The military judge found the statement admissible under two theories. First, it was a statement made in furtherance of a continuing conspiracy by the appellant, or one of the four other conspirators, to rob non-blacks that night/morning. Record at 251; Mil. R. Evid. 801(d)(2)(E). Second, the statement, if made by the appellant, was evidence of the intent and motive of the appellant "to assault and rob whites but not blacks and have others join him in the future enterprise," and admissible under Mil. R. Evid. 803(3). Record at 252. In the face of the defense objection, the military judge conducted the balancing test under Mil. R. Evid. 403, and concluded the statement was admissible as relevant and not unduly prejudicial. Record at 233. Limiting instructions were given after the statement was introduced to the members, and again in final instructions. Record at 414-15, 949.

Notwithstanding the appellant's misplaced objections under Mil. R. Evid. 404, and after reviewing the record, we find the statement admissible as a statement of the accused under Mil. R. Evid. 801(d)(2)(A), as recognized by trial and defense counsel in the record at page 232. The military judge did not abuse his discretion in admitting the statement.

PRODUCTION OF DEFENSE WITNESSES

Assignment of Error VI involves the military judge's determination that a witness who would testify to the character for truthfulness of a defense alibi witness (who was a co-conspirator and certainly to be tested on cross-examination, hereinafter F) was unavailable for trial and a deposition would be substituted. Additionally, two other witnesses inexplicably came up missing shortly before they were to be called by the defense, although they had been present and told to remain at the site of the trial. Record at 805-15. We find this assignment of error to be without merit.

The witness request for the character witness was submitted on 5 April 1990, after two Article 39(a) sessions had been held. There is no evidence in the record of any written request for the two missing defense witnesses. The trial was scheduled for 11 April 1990. At an Article 39(a), UCMJ, session held on Friday, 6 April 1990, and before a reply to the written request was prepared by the convening authority, the defense counsel informed the court that the character witness, a gunnery sergeant for an 85-man weapons platoon, was scheduled to deploy for 3 months to Panama on 7 or 8 April. The appellant moved to have the military judge order the gunnery sergeant to remain at the site of trial. The gunnery sergeant took the stand and testified that from the nearly 1 year he had known F, he had gained the opinion that F was truthful and he would believe him under oath. The gunnery sergeant had no knowledge of F's reputation for truthfulness. Record at 57-68.

As to the gunnery sergeant's imminent deployment, he testified that in addition to being the weapons platoon gunnery sergeant, he was also the gunnery sergeant for the entire deploying company. He stated that his duties were

severe in getting the company ready to deploy. Record at 65. Additionally, he said his duties in Panama would be extensive and the people he was to relieve were rotating back after 4½ months in Panama. Record at 72. The military judge found the witness to be relevant and material, but determined that military necessity would make him unavailable for trial. Record at 68, 80. The military judge then ruled that the defense counsel should examine the gunnery sergeant at the 6 April 1990, Article 39(a), UCMJ, session for use as a deposition-type alternative to live testimony at the trial.

Each party is entitled to the production of any witness whose testimony on a matter in issue on an interlocutory question would be relevant and necessary. Art. 46, UCMJ; 10 U.S.C.
§ 846; R.C.M. 703(b). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Mil. R. Evid. 401. Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(b)(1) Discussion. A party is not entitled to the presence of a witness who is "unavailable" as defined by Mil. R. Evid. 804(a). However, if a witness is determined to be unavailable, and that person's testimony:

> is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence, or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

R.C.M. 703(b)(3). Military Rule of Evidence 804(a)(6) defines "unavailable" to include situations in which a witness is unable to appear because of "military necessity" (incorporating Article 49(d)(2), UCMJ). *See also United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976)(a pre-evidence rules case).

In determining unavailability, the military judge must "weigh all the facts and circumstances of the case, keeping in mind the preference for live testimony." *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986). Moreover,

> [f]actors to be considered include the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay.

Id. at 229. The standard for review of a military judge's determination of unavailability is abuse of discretion. *United States v. Hampton*, 33 M.J. 21 (C.M.A. 1991); *Cokeley*, 22 M.J. at 225; *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986), *cert. denied*, 479 U.S. 835 (1986).

An accused may make a pretrial motion to the military judge for appropriate relief in the nature of a motion for the production of the witness. R.C.M. 905(b)(4), 906(b)(7). If a ruling on a request for the personal attendance of a witness is adverse to the accused, the ruling is subject to review and reversal if there has been an abuse of discretion. *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978). Reversal is not automatic for an erroneous denial. Reversal is required only when there is a fair risk of prejudice to the appellant. Prejudice is calculated from the

totality of the circumstances. *United States v. Allen*, 31 M.J. 572, 612-13 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209, 214 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992).

We have reviewed F's testimony, and particularly the Government's cross-examination. Record at 572-631. We see little, if any, impeachment made by the trial counsel on the direct, exculpatory testimony of the witness. We find that the military judge did not abuse his discretion in ruling the gunnery sergeant unavailable and substituting the reading of the previous testimony. Additionally, in view of the admission of the gunnery sergeant's testimony in deposition form, noting the nearly non-existent impeachment of F, and remembering there was an eyewitness to the crime, we find no fair risk of prejudice to the appellant from the procedure used.

With regard to the two missing witnesses, an Article 39(a), UCMJ, session was held where it was determined that the two were nowhere to be found after diligent effort. Record at 809-14. In requesting a trial delay, the defense counsel described the witnesses as "crucial alibi witnesses." They would "corroborate the testimony of the other witnesses that, in fact, they [the group of five conspirators] were there [Rich's, a dance club]." Record at 813. This point was important to the defense because the only "hole" in F's alibi testimony was the fact that his initials could not be found on the entry log to Rich's club. Record at 604; Prosecution Ex. 14. Over defense objection, the military judge determined that because the witnesses were not located and there was no time certain when they might return, the trial would continue and stipulations would be substituted. Again, we review the military judge's decisions on unavailability and adequate substitute evidence for live testimony for abuse of discretion. *See Hampton*, 33 M.J. at 23; *Allen*, 31 M.J. at 612-13.

The military judge did not abuse his discretion in determining that the witnesses were unavailable and in denying a continuance. The defense counsel admitted the witnesses were cumulative when he stressed that their critical function was to corroborate testimony of other witnesses. Additionally, a view of the totality of the circumstances in substituting stipulations for these cumulative witnesses' brief testimony reveals no prejudice.

JUVENILE ADJUDICATION

As his seventh assignment of error, the appellant faults the trial judge for denying the defense the use of a juvenile adjudication of the eyewitness. The eyewitness had been to court for grand larceny before he joined the Marine Corps. The military judge ruled under Mil. R. Evid. 609(d). He stated: "I think that 609(d) is clear. It does allow some leeway on the part of the military judge, and quite frankly it appears to be an adjudication of a youthful offender as the trial counsel indicates is not a conviction, and I'm not going to allow it." Record at 255. Military Rule of Evidence 609(d) balances society's interest in not stigmatizing youthful misconduct and the appellant's confrontation rights. The military judge found that no unusual aspect of the juvenile adjudication required its admission "for a fair determination of the issue of guilt or innocence." Mil. R. Evid. 609(d); *Davis v. Alaska*, 415 U.S. 308 (1974)(holding error not to admit juvenile adjudication for which witness was still on probation to show bias and motive to lie). Assignment of Error VII is without merit.

ADMISSIBILITY OF THE APPELLANT'S PRIOR CONVICTION UNDER MIL. R. EVID. 609

Assignment of Error VIII involves the military judge's denial of the defense motion *in limine* to suppress the

appellant's prior special court-martial conviction for assault on a noncommissioned officer, disobedience of a noncommissioned officer, and disrespect to a noncommissioned officer in December 1988. The appellant was adjudged, among other punishments, a bad-conduct discharge and the conviction met all preliminary requirements for admissibility to impeach under Military Rule of Evidence 609 then in effect at the time.[8] Record at 234-42, 252, 850; Prosecution Ex. 34. The military judge was faced with the difficulties expressed in *United States v. Sutton*, 31 M.J. 11 (C.M.A. 1990), in ruling on whether impeachment evidence of a prior conviction could be admitted against the accused before the accused testified. Ultimately, the appellant did not testify. Although this procedure was embraced earlier by the Court of Military Appeals in *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981), and permitted the preservation of the objection even if the accused did not testify, it was abandoned in military practice for all cases after 6 September 1990. *Sutton*, 31 M.J. at 18; *see Luce v. United States*, 469

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[8] **Rule 609. Impeachment by Evidence of Conviction of Crime**

(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, or (2) involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

U.S. 38 (1984). Because the appellant's case came before *Sutton*, we will review the judge's ruling.

In *Cofield*, the appellant was asking for a ruling on the technical admissibility of a prior summary court-martial -- a matter of form. Here, as recognized by the military judge, the appellant was asking the military judge to suppress the conviction without knowing what the appellant would say. This the military judge chose correctly to avoid. The judge's expressed concern, recognized in the case law, was the danger in misleading the defense into placing the appellant on the stand and having the conviction be made admissible through the testimony of the appellant. The military judge invited the defense to revisit the motion when the appellant needed to chose to testify or not. Record at 242. The judge also recognized his obligation to fulfill a balancing of the prejudicial effect compared to the probative value of any prior conviction of the appellant that might be otherwise technically admissible. Record at 241, 252.

Later, the appellant asked the military judge to reconsider his ruling and, when the judge persisted in his denial of the suppression, the defense declared that, but for the judge's ruling, the appellant would have testified. Record at 850-51. The military judge did not delineate his balancing process in overruling the defense objection. *United States v. Brenizer*, 20 M.J. 78 (C.M.A. 1985); *United States v. Sitton*, 39 M.J. 307 (C.M.A. 1994). In the area of admissibility of prior convictions, "[b]road discretion is vested in trial judges, and appellate courts should not disturb their decisions 'absent a clear showing of abuse' of discretion." *Brenizer*, at 82 (quoting *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir.), *cert. denied*, 434 U.S. 897 (1977); *United States v. Perry*, 12 M.J. 920, 923 (N.M.C.M.R.), *petition denied*, 13 M.J. 245 (C.M.A. 1982)). We will reverse the judge's ruling under these circumstances only for clear abuse of discretion.

The factors we consider relevant to the balancing of probative value and prejudicial impact under Mil. R. Evid. 609 are:

(1) The impeachment value of the prior crime.

(2) The point in time of the conviction and the witness' subsequent history.

(3) The similarity between the past crime and the charged crime.

(4) The importance of the defendant's testimony.

(5) The centrality of the credibility issue.

Brenizer, 20 M.J. at 80 (citing *United States v. Hawley*, 554 F.2d 50, 53 n.5 (2d Cir.1977); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976)).

Applying these points of analysis, we heed Judge Cox's admonition that "[w]here there is a strong resemblance between offenses, the danger is that the court members may reason that 'if he did it before he probably did so this time.'" *Brenizer*, 20 M.J. at 81 (citation omitted). Under the first factor, we do not believe that the involvement of an assault on a noncommissioned officer is so similar to robbery that this aspect of the prior conviction would overwhelm the correct judgment of the members, especially accompanied by limiting instructions that the military judge did say he would give. Record at 851. The conviction displayed disregard for duty and authority and "[i]t is not illogical . . . to infer that a servicemember who thinks so little of his service commitment as to . . . [disobey, assault, and treat with disrespect a noncommissioned officer] may also take lightly his obligation to testify truthfully, especially when his own

neck is on the block." *Brenizer*, 20 M.J. at 81. Under the second factor, we note that the prior conviction was only about 13 months prior to the charged offenses. The third factor is discussed above with the first, emphasizing the gravamen of the prior offense was disregard for authority and obligations. A more problematic analysis arises under the fourth factor. How critical was the appellant's testimony? A companion for the entire night and morning in question had testified in an entirely exculpatory manner, with little if any impeachment. Record at 572-631; Assignment of Error VI. *supra*. Other evidence and testimony was introduced to suggest that the appellant was not and could not have been involved in the robbery. We do not believe that information important to the defense was improperly kept from the fact finders. Under the fifth factor, if the appellant testified, the case came down to his *credibility* versus the *accuracy* of the eyewitness. We believe that under such circumstances "it is preferable that as much information as possible be provided the court to aid it in its decision." *Brenizer*, 20 M.J. at 81-82 (citations omitted). The probative value of the appellant's prior conviction outweighed any prejudicial effect it might have. Should the appellant have testified, it would have been proper for the fact finders to know that he "was a convicted felon, with nothing to lose by lying because he was already on his way out of the military with a punitive discharge." *Sitton*, 39 M.J. at 310.

GOVERNMENT DESIGNATED REPRESENTATIVE

The appellant objected to the lead criminal investigator sitting at counsel table with the prosecutor as a designated representative under Mil. R. Evid. 615(2).[9] The

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[9] **Rule 615. Exclusion of Witnesses**

At the request of the prosecution or defense the military judge shall

investigator did testify at trial. Record at 511. Although not controlling, we note that the appellant did not request that the representative testify first. We find this assignment of error to be without merit. *United States v. Ayala*, 22 M.J. 777 (A.C.M.R. 1986), *aff'd*, 26 M.J. 190 (C.M.A. 1988); *United States v. Scott*, 13 M.J. 874, 877-78 (N.M.C.M.R. 1982), *rev'd on other grounds*, 16 M.J. 449 (C.M.A. 1983)(summary disposition), *aff'd on remand*, 17 M.J. 724 (N.M.C.M.R 1983), *aff'd*, 22 M.J. 297 (C.M.A. 1986), *cert. denied*, 480 U.S. 931 (1987).

TRIAL JUDGE IMPARTIALITY

Although the trial judge must maintain impartiality, the judge is not a potted plant. Mil. R. Evid. 614; *United States v. Dock*, 40 M.J. 112, 127 (C.M.A. 1994). The judge must not abandon the "role of an impartial party and assist in the conviction of a specific accused." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987), *quoted in Dock*, 40 M.J. at 128. This assertion of error is based mostly on rulings made by the military judge contrary to the defense arguments. The three citations to embarrassing the trial defense counsel in front of the members do not bear out that the trial judge tried to embarrass the defense counsel or that he did. Overall, the defense was marked by alertness and tenacity, and the colloquies referred to in the appellant's brief

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order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case.

do not diminish that impression. Assignment of Error X is without merit.

Accordingly, the findings of guilty and the sentence, as approved on review below, are affirmed.

P.J. McLAUGHLIN

Chief Judge LARSON and Senior Judge WELCH concur.

DAVID C. LARSON

EDWIN W. WELCH